IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Criminal Case No. 18-cr-00415-REB-JMC

UNITED STATES OF AMERICA,

Plaintiff,

v.

WAMBLI MILLS,

Defendant.

ORDER DENYING MOTIONS TO SUPPRESS

Blackburn, J.

The matters before me are the (1) **Motion To Suppress Evidence Derived From a Warrantless Search** [#36],[1] filed May 27, 2019; and (2) **Motion To Suppress Evidence Derived From a Warrantless Arrest** [#46], filed June 2, 2019, by defendant Wambli Mills. The government filed responses [##59 & 63], and Mr. Mills filed a reply to the unlawful arrest motion [#67]. I held a hearing on both motions on June 25, 2019, at which I received evidence and argument. I deny the motions.

In fashioning my ruling I have considered all relevant adjudicative facts in the file and record of this case. I have considered the evidence educed at the June 25, 2019, suppression hearing. I have considered, but not necessarily accepted, the reasons stated, arguments advanced, and authorities cited by counsel in their papers and during

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[1] "[#36]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

oral argument following the hearing.

In assessing the credibility of the law enforcement officers who testified during the suppression hearing, I have considered all facts and circumstances shown by the evidence that affected the credibility of the witnesses, including the following factors: the witness's means of knowledge, ability to observe, and strength of memory; the manner in which each witness might be affected by the outcome of the hearing; the relationship each witness has to either side in the case; and the extent to which, if at all, each witness was either supported or contradicted by other evidence presented during the hearing.

I have considered the totality of relevant circumstances. My findings of fact are based on at least a preponderance of the evidence.

I. FINDINGS OF FACT

On the evening of September 1, 2017, Anthony Garcia, a police officer with the Bureau of Indian Affairs ("BIA"),[2] was conducting a drug investigation at a home near the intersection of Mountain Sage Road and Sundance Street within the exterior boundaries of the Ute Mountain Ute Reservation in Towaoc, Colorado. Officer Garcia was conducting a consensual encounter with three individuals outside the home near his patrol car, which was parked in the driveway.

Officer Garcia has been a law enforcement officer since 2001 and has spent his career working in Native American pueblos and reservations. He has worked for the BIA in Towaoc for 8 years. He testified that Towaoc had a higher rate of crime than

[2] In April 2014, Officer Garcia was appointed as a Special Agent with the BIA. For purposes of this order only, I refer to him as "Officer Garcia."

other areas of Indian Country in which he has worked. Moreover, he knew the intersection where he was stationed that night as the site of assaults on other officers. The area is sparsely populated, and there are no street lamps. It was full dark outside, and other than the lights from the house and porch, there was no illumination. No other officers were present with Officer Garcia at that time.

Around 8:30 p.m., Officer Garcia heard a female screaming from the vicinity of a field west of Mountain Sage Road. As Officer Garcia came around his patrol vehicle to investigate further, a woman, later identified as J.H., came running out of the field. She appeared frantic and was crying. As Officer Garcia attempted to calm J.H. down, she told him she had been raped, although she did not know by whom.

Shortly after calling for backup and an ambulance, Officer Garcia heard a male voice yell "Fuck you!" from the direction of the field and then heard whistling, but it was too dark to see who made those sounds. He did not attempt to further investigate the matter at that time, however, because he was still alone.[3]

Subsequently, Officer Christopher Cable, a tribal security officer, and the ambulance arrived at the scene. As Officer Garcia was helping J.H. to a gurney, she fell to the ground, complaining of pain in her ankle. Only then did Officer Garcia notice she was naked from the waist down. She was, however, still wearing her shoes, which

[3] The time line of these various arrivals is unclear. Officer Garcia testified the ambulance and Officer Cable arrived on the scene approximately 15 to 20 minutes after he called them, although his contemporaneous report of the incident suggested they arrived within 5 to 7 minutes. Officer Garcia also did not recall precisely when the tribal security officer arrived, but he testified he used his night vision goggles about eight minutes after he heard the male voice yelling and whistling from the field, or approximately ten minutes after first encountering J.H. By that point, the tribal security officer had arrived, as he was the one that alerted Officer Garcia that someone was out in the field. At any rate, it appears clear that when Officer Garcia went into the field, he did not have backup present.

Officer Garcia observed had waffle-like soles. The ambulance then took J.H. to the hospital, and Officer Cable left with the drug transaction suspect from Officer Garcia's original encounter.

After the ambulance left, the security officer pointed out to Officer Garcia that there was someone standing in the field from which Officer Garcia had heard the male voice earlier. The security officer flashed his light out into the field, and Officer Garcia saw the silhouette of a person, approximately 20 yards away, who responded to being thus illuminated by crouching down behind a bush, as if attempting to hide. Officer Garcia then used his department-issued night vision goggles to survey the field. He saw an individual still crouched behind the brush. The figure slowly moved toward a nearby tree, in what Officer Garcia perceived to be a further furtive attempt at concealment.

Although still essentially alone,[4] Officer Garcia nevertheless decided to investigate further. He knew J.H. claimed to have been raped and had run out from the field where the unidentified individual was hiding. He knew too that biological trace evidence could dissipate quickly and thus that time might be critical. Concerned reasonably for his own safety, he made a wide approach and found an individual, later identified as Mr. Mills, laying in the field in what Officer Garcia interpreted as a further attempt to hide. Officer Garcia flashed his light on Mr. Mills, drew his gun, and told Mr. Mills to put his arms out to his sides, like an airplane. Mr. Mills complied, and Officer Garcia holstered his weapon, knelt on Mr. Mills's shoulder, and handcuffed him,

[4] Tribal security officers are not law enforcement officers and may provide only limited assistance to law enforcement. They may not arrest a suspect or provide backup to an officer conducting an arrest.

intending to detain him for further questioning. When Officer Garcia rolled Mr. Mills over and sat him up so he could walk Mr. Mills back to the patrol car, he detected a strong odor of alcohol coming from Mr. Mills.

Officer Garcia stood Mr. Mills up, patting him down for weapons. As he did so, Mr. Mills became aggressive and angry, and yelled spontaneously and without solicitation, "I didn't do anything to her. Why are you arresting me?" Officer Garcia responded that he was simply detaining Mr. Mills for questioning. He walked Mr. Mills, still handcuffed, back to the patrol car and placed him in the back seat. At that point, Officer Garcia noticed Mr. Mills had what appeared to be a black cloth wrapped around his neck.

Around this time, Officer Cable returned, and he and Officer Garcia proceeded to search the field. They noticed some tracks that appeared to be of the same size and sole pattern as those J.H. had been wearing leading to a residence at 1155 West Sundance Court, Mr. Mills's home, located at the far northwest end of the field. Officer Garcia went to the home and spoke first to Mr. Mills's mother, who said Mr. Mills was asleep upstairs. He then spoke to Mr. Mills's father who reported Mr. Mills had gone out with friends. Officer Garcia then returned to the patrol car, confirmed with Mr. Mills his identity, and placed him under arrest for intoxication and disorderly conduct.

Officer Garcia transported Mr. Mills to the Chief Ignacio Justice Center. On the way, Mr. Mills told Officer Garcia, unprompted, that he had seen the ambulance and wanted to see what was going on and that his dad "sent him over to check on her." He then said, "I didn't do nothing, I don't even associate with them guys."

Once at the detention center, Officer Garcia noticed that what he had taken for a

black cloth tied around Mr. Mills's neck was actually a pair of women's pants. Officer Garcia booked the pants into evidence. Pursuant to detention center policy, Mr. Mills then was required to change into jailhouse clothing and surrender his own clothing. As Mr. Mills was removing his shorts, Officer Garcia observed a pair of pink women's underwear, which had been tucked into Mr. Mills's waistband, fall out on top of the pile of clothing. All Mr. Mills's clothing was collected for a possible sexual assault investigation and placed into evidence at the Ute Mountain Ute Agency.

Meanwhile, Officer Cable had contacted BIA Special Agent Lyle Benally, who was responsible for investigating major crimes on the Ute Mountain Ute Reservation, about the possible sexual assault of J.H. Special Agent Benally went to Southwest Memorial Hospital to speak to J.H., but was unable to interview her at that time. She subsequently spoke with, first, Officer Garcia, and then later with Special Agent Benally. Through no fault of his own and due to circumstances beyond his control, Special Agent Benally was unable to interview Mr. Mills until April 2018. Shortly thereafter, Special Agent Benally sent the clothing collected from Mr. Mills on the night of his arrest and a Sexual Assault Nurse Examination (SANE) kit taken from J.H. to the FBI laboratory in Quantico, Virginia, for DNA testing.

The FBI lab returned its report in December 2018. Female DNA was found on the women's underwear, Mr. Mills's underwear, and the black pants that had been wrapped around his neck. (Hrg. Exh. 9 at LAB_00000005.) The report found a high likelihood that this DNA came from J.H.[5] On September 11, 2018, Mr. Mills was

[5] No DNA profile of Mr. Mills was sent to the FBI lab.

indicted on one count of Sexual Abuse in Indian County, in violation of 18 U.S.C. §§ 1153 & 2242(2), and one count of Aggravated Sexual Abused in Indian Country, in violation of 18 U.S.C. §§ 1153 & 2242(a)(1).

II. CONCLUSIONS OF LAW

Mr. Mills first seeks to suppress the evidence derived from his warrantless arrest. ***See United States v. Jarvi***, 537 F.3d 1256, 1259 (10th Cir. 2008) ("The poisonous tree doctrine allows a defendant to exclude evidence "come at by exploitation" of violations of his Fourth Amendment rights.") (citing ***Wong Sun v. United States***, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963)). The government counters that Officer Garcia's initial interactions with Mr. Mills were merely an investigatory detention which quickly ripened into an arrest when Officer Garcia detected the smell of alcohol on Mr. Mills. I concur with the government's position and therefore deny the motion to suppress evidence incident to arrest.

The Tenth Circuit has recognized three categories of police-citizen encounters:

> (1) consensual encounters which do not implicate the Fourth Amendment; (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause.

United States v. Ringold, 335 F.3d 1168, 1171-72 (10th Cir.) (quoting ***United States v. Torres–Guevara***, 147 F.3d 1261, 1264 (10th Cir.1998), ***cert. denied***, 124 S.Ct. 589 (2003) (internal quotation marks and citation omitted). "These categories are not static. A consensual encounter may escalate into an investigative detention. An investigative

detention may escalate into a full-blown arrest, or it may de-escalate into a consensual encounter." ***United States v. Shareef***, 100 F.3d 1491, 1500 (10th Cir. 1996).

The evidence before me plainly establishes that Officer Garcia's initial interaction with Mr. Mills, including his use of his service weapon and handcuffs, was a permissible investigative detention. Pursuant to ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), an officer may temporarily detain an individual suspected of criminal activity – without sufficient facts to establish the probable cause necessary to effectuate a full arrest – if the officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry***, 88 S.Ct. at 1880. ***See also Michigan v. Summers***, 452 U.S. 692, 700, 101 S.Ct. 2587, 2593, 69 L.Ed.2d 340 (1981) (although ***Terry*** stop is a seizure, as a "limited intrusion[] on the personal security of those detained" it is "justified by such substantial law enforcement interests that [it] may be made on less than probable cause"). Nevertheless, a valid ***Terry*** stop "must be limited in scope to the justification for the stop." ***United States v. Perdue***, 8 F.3d 1455, 1462 (10th Cir. 1993).

I have little trouble in concluding that Officer Garcia's initial interaction with Mr. Mills was a proper investigatory detention. "Since police officers should not be required to take unnecessary risks in performing their duties, they are 'authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of [an investigative detention].'" ***Perdue***, 8 F.3d at 1462 (quoting ***United States v. Hensley***, 469 U.S. 221, 235, 105 S.Ct. 675, 683-84, 83 L.Ed.2d 604 (1985)). Thus, an officer may draw a weapon if he reasonably believes

such is necessary for his protection. ***United States v. Merritt***, 695 F.2d 1263, 1273 (10th Cir. 1982), ***cert. denied***, 103 S.Ct. 1898 (1983). Likewise, a suspect may be ordered to the ground or handcuffed without an investigatory detention becoming an arrest. ***See Perdue***, 8 F.3d at 1463 (collecting cases). The issue is one of whether those actions were reasonable under the totality of the circumstances. ***Id.***

The totality of the relevant circumstances here justified the precautions Officer Garcia took for his own safety. Shortly after J.H. told Officer Garcia she had been raped, he heard a male voice yell "Fuck you!" and whistling from the direction of the same field J.H. had come from. Not long thereafter, Officer Garcia saw a figure, which reasonably appeared to be attempting to evade detection, in that same area. ***See Illinois v. Wardlow***, 528 U.S. 119, 124-25, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000). It was late at night in an unilluminated and sparsely populated area known to Officer Garcia to have been the site of previous officer assaults and generally high crime – indeed, he had been investigating a drug transaction in that area just before he encountered J.H. Officer Garcia knew it was important to act quickly to preserve possible biological and other evidence in sexual assault cases. He was alone and had no knowledge of when backup might arrive.

Mr. Mills argues Officer Garcia had no knowledge that Mr. Mills was armed or violent, pointing to cases in which the Tenth Circuit has held such knowledge sufficient to justify a more intrusive investigatory detention. Yet, while such information may be sufficient to justify handcuffing a suspect or drawing a weapon during an investigatory detention, it certainly is not necessary in every instance. While Officer Garcia may not

have known affirmatively that the hiding figure he approached in a dark and deserted field was armed or violent, he had no knowledge the suspect was not armed or violent, either. Officer Garcia could reasonably infer and conclude that Mr. Mills was probably the person who earlier had cursed and whistled in apparent attempt to provoke or intimidate either Officer Garcia and/or J.H. Moreover, although Officer Garcia acknowledged Mr. Mills complied with his orders, that alone did not remove all concern for his own safety given all the other considerations then at play. I thus find and conclude that Officer Garcia's actions in approaching Mr. Mills with his weapon drawn and in handcuffing Mr. Mills constituted a reasonable, constitutionally permissible investigatory detention.

Moreover, almost immediately as he rolled Mr. Mills over and sat him up, Officer Garcia perceived a strong odor of alcohol emanating from Mr. Mills. Under the Fourth Amendment, an officer may make a warrantless arrest when the officer has probable cause to believe the person to be arrested has committed a crime. ***United States v. Valenzuela***, 365 F.3d 892, 896 (10th Cir. 2004); ***United States v. Vazquez-Pulido***, 155 F.3d 1213, 1216 (10th Cir.), ***cert. denied***, 119 S.Ct. 437 (1998). This is an objective standard, ***District of Columbia v. Wesby***, – U.S. –, 138 S.Ct. 577, 585 n.2, 199 L.Ed.2d 453 (2018); ***Valenzuela***, 365 F.3d at 896, which looks to the totality of the circumstances, ***Illinois v. Gates***, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983); ***United States v. Hansen***, 652 F.2d 1374, 1388 (10th Cir. 1981). While probable cause to arrest does not require facts sufficient to establish guilt, it does demand more than mere suspicion. ***Hansen***, 652 F.2d at 1388.

Under the Ute Mountain Ute Penal Code, it is an offense, *inter alia*, to possess "any beer, ale, wine, whiskey or any article whatsoever which produces alcoholic intoxication." 6 UMUC § 21.[6] Federal law also makes it a crime (except in limited circumstances not argued to be implicated here) to "possess[] intoxicating liquors in the Indian Country[.]" 18 U.S.C. § 1156. Mr. Mills's apparent intoxication, indicated by the distinct odor of alcohol coming from him, gave Officer Garcia adequate probable cause to arrest Mr. Mills for that crime.[7]

That Officer Garcia instead arrested Mr. Mills for two different crimes – disorderly conduct and public intoxication – is of no consequence.[8] Because probable cause is measured objectively, "[t]hat an officer may not have subjectively believed probable cause existed to arrest a suspect for a certain crime does not preclude the Government from justifying the suspect's arrest based on any crime an officer could objectively and reasonably have believed the suspect committed." ***Culver v. Armstrong***, 832 F.3d 1213, 1218 (10th Cir. 2016). ***See also Beattie v. Smith***, 543 Fed. Appx. 850, 859 n.3 (10th Cir. Nov. 13, 2013) ("[S]o long as there is a reasonable basis for the arrest, the seizure is justified on that basis even if any other ground cited for the arrest was flawed.") (citations and internal quotation marks omitted); ***United States v. Turner***, 553

[6] Section 21 also makes it an offense, *inter alia*, to use or consume 3.2 beer.

[7] Despite Mr. Mills's suggestion to the contrary at the hearing, intoxication is plainly circumstantial evidence of possession of alcohol.

[8] The crime of intoxication as defined by the Ute Mountain Ute Penal Code requires proof that a person is "under the influence of an intoxicating beverage . . . to a degree that the person may endanger himself or others in a public place or a private place where he unreasonably disturbs another person." 6 UMUC § 12. Disorderly conduct includes "intentionally, knowingly, or recklessly" making "unreasonable noise or offensively coarse utterances." 6 UMUC 12(A)(2).

F.3d 1337, 1345 (10th Cir. 2009) ("[T]he probable cause inquiry . . . requires merely that officers had reason to believe that a crime – any crime – occurred."). Accordingly, Officer Garcia had probable cause to arrest Mr. Mills within mere seconds of handcuffing him, which arrest, in turn, justified the continued, uninterrupted, physical restraint of his hands.

Finally, Mr. Mills challenges the search of his clothing for DNA evidence. Mr. Mills acknowledges, as he must, that a search incident to a lawful arrest is permissible. ***United States v. Robinson***, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 38 L.Ed.2d 427 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."). Moreover, he admits that such a search is valid "even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other." ***United States v. Edwards***, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974). Nevertheless, he claims the Supreme Court's decision in ***Edwards*** left open the possibility that custodial searches might be found unreasonable in other circumstances. ***Id.***, 94 S.Ct. at 1239 & n.9.[9]

While that observation is true, as far as it goes, it is not availing to Mr. Mills here. It is clear from the facts of this case that the clothing taken from Mr. Mills on the night of

[9] Mr. Mills further suggests the DNA testing was intrusive, and therefore subject to heightened scrutiny. There are at least two problems with this argument. First, it is questionable where Mr. Mills was personally aggrieved to the extent necessary to challenge the testing, since no DNA profile was obtained for or from him. Second, and even if Mr. Mills was personally aggrieved as required under the Fourth Amendment, the extraction of DNA from a person's clothing is substantially less intrusive than a buccal swab, which the Supreme Court has found permissible as part of routine booking procedures for suspects in custody. ***Maryland v. King***, 569 U.S. 435, 463-64, 133 S.Ct. 1958, 1977-79, 186 L.Ed.2d 1 (2013).

his arrest was retained for "a reasonable time and to a reasonable extent." ***Id.*** at 1240 (citation and internal quotation marks omitted). Special Agent Benally testified credibly that he did not send the clothing to the FBI lab until he had an opportunity to interview Mr. Mills, which interaction was delayed for reasons either having nothing to do with the investigation itself or having to do with the vagaries of the investigation itself. Thus, that decision was not unreasonable under the totality of the circumstances.

Additionally, there is no suggestion or showing that Mr. Mills was somehow prejudiced by any lack of access to the clothing or any delay in its testing. He did not request a return of his clothing, and he does not claim spoilation of the evidence. There is no evidence that would inquinate or vitiate the validity of the testing conducted.

III. ORDERS

Based on the foregoing, I find and conclude that both motions to suppress must be denied.

THEREFORE, IT IS ORDERED as follows:

1. That the **Motion To Suppress Evidence Derived From a Warrantless Search** [#36], filed May 27, 2019, is denied; and

2. That the **Motion To Suppress Evidence Derived From a Warrantless Arrest** [#46], filed June 2, 2019, is denied.

Dated July 1, 2019, at Denver, Colorado.

BY THE COURT:

Bob Blackburn

Robert E. Blackburn
United States District Judge